Journal of Air Law and Commerce

Volume 48 | Issue 4 Article 9

1983

Federal Rule of Evidence 407 and Strict Products Liability - The Rule against Subsequent Repairs Lives on

John Blakely Low

FEDERAL RULE OF EVIDENCE 407 AND STRICT PRODUCTS LIABILITY-THE RULE AGAINST SUBSEQUENT REPAIRS LIVES ON

JOHN BLAKELY LOW

"It would be [barbarous]," Baron Bramwell wrote over one hundred years ago, "to hold that, because the world gets wiser as it gets older, therefore it was foolish before."[1] The Baron was speaking specifically about the doctrine of subsequent repairs,[2] an area of the law which, until recently,[3] had been well-settled.[4] Evidence of remedial measures taken after an injury-causing event to prevent a future occurrence of a similar event has not been admissible in the past to establish a defendant's negligence or culpable conduct.[5] While there are

---

[1] Hart v. Lancashire & Yorkshire Ry., 21 L.T.R. (n.s.) 261, 263 (1869).

[2] The doctrine of subsequent repairs is actually an exclusionary rule of evidence which precludes the admission of evidence of subsequent remedial measures taken by a manufacturer following an accident. *See* FED. R. EVID. 407 and advisory committee note. The terms "exclusionary rule", "Rule 407", and "subsequent repairs rule" used throughout this comment refer to the doctrine of subsequent repairs.

[3] *See* Unterburger v. Snow Co., 630 F.2d 599 (8th Cir. 1980) (rule against subsequent repairs does not apply to actions based on strict liability); Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977) (evidence of subsequent repairs admissible under strict liability count); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977) (evidence of subsequent remedial warning admissible in strict liability cause of action); Abel v. J.C. Penney Co., 488 F. Supp. 891 (D. Minn. 1980), *aff'd*, 660 F.2d 720 (8th Cir. 1981) (subsequent repair evidence admissible in strict liability action).

[4] *See infra* note 7 for a list of cases refusing to admit evidence of subsequent repairs in both negligence and strict liability actions.

[5] For general discussions of the early development of the doctrine of subsequent repair, see C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 275, at 666 (2d ed. 1972) [hereinafter cited as C. MCCORMICK] and 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 283(4), at 151 (3d ed. 1940) [hereinafter cited as J. WIGMORE].

a number of recognized exceptions to the doctrine,[6] it has nevertheless retained its vitality over the years in the field of negligence.[7] In the last ten years, however, with the appearance of strict liability,[8] the doctrine of subsequent repairs has come

---

[6] Both the general rule and exceptions to it were codified in 1975 in FED. R. EVID. 407, which provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id.

[7] Over the years the doctrine of subsequent repairs has had an even application; *see, e.g.*, Grenada Steel Indus., Inc. v. Ala. Oxygen Co., 695 F.2d 883 (5th Cir. 1983) (change in design of acetylene gas valve following fire, inadmisible for the reason that such evidence has no bearing on the negligence of the manufacturer at time of accident); Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975) (change in warning given by drug company following accident inadmissible for reason that such evidence discourages subsequent repairs and is not relevant to defendant's antecedent negligence); Ward v. Hobart Mfg. Co., 450 F. 2d 1176 (5th Cir. 1971) (changes made in design of meat grinder following accident inadmissible for reason that such evidence, if admitted, would discourage manufacturers from improving the safety features of their products); Limbeck v. Interstate Power Co., 69 F.2d 249 (8th Cir. 1934) (changes made in construction following electrically-caused fire inadmissible, for reason that such evidence not proper as showing a negligent construction before the fire.); Bingham Mines Co. v. Bianco, 246 F.2d 936 (8th Cir. 1917) (repairs made following death in a mine inadmissible for reason that such evidence is distinctly prejudicial and has no legitimate tendency to prove negligence at time of accident); Southern Ry. v. Simpson, 131 F. 705 (6th Cir. 1904) (custom of blowing whistle and ringing bell at intersection adopted following accident inadmissible for reason that such evidence is incompetent to show the custom of defendant before the collision); Columbia & P.S.R.R. v. Hawthorne, 144 U.S. 202 (1892) (subsequent placing of safeguards on machine after injury inadmissible for reason that such evidence is incompetent to prove prior negligence at time of accident). For additional case law on this issue, see Annot., 50 A.L.R. FED. 935 (1980).

[8] The basic theory of strict liability is contained in RESTATEMENT (SECOND) OF TORTS, § 402A (1965), which provides in relevant part:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product; and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

The decision which brought strict liability to the forefront was the 1963 case of Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Greenman* the plaintiff was injured while working on a power tool that ejected a piece of wood which struck him in the face. Believing the machine to be defective, the plaintiff brought suit against the manufacturer in negligence and breach of warranty. The manufacturer defended on the ground that the plaintiff did not give notice of the breach of warranty within a reasonable time, and therefore his claim was barred. The court held that it was not necessary for the plaintiff to establish an express warranty and that the plaintiff had a valid cause of action under a strict liability theory. Chief Justice Traynor's opinion for the court set forth the first definition of true strict liability: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Greenman*, 377 P.2d at 900, 27 Cal. Rptr. at 700.

After *Greenman* and RESTATEMENT (SECOND) OF TORTS § 402A (1965), the theory of strict liability became an integral tool in a plaintiff's suit for damages. To make out a cause of action in strict liability, a plaintiff must establish two elements. The first element of a strict liability action is the existence of a defect. According to Chief Justice Traynor, a defective product may be defined as "one that fails to match the average quality of like products, and the manufacturer is then liable for injuries resulting from deviations from the norm." Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965). In additon to the defect, the plaintiff must show that the defect caused the injury. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1965) for a brief discussion of establishing the defect as the cause of injury.

The second element is that the defect existed at the time it left the manufacturer's control. If the product is delivered by the manufacturer in a safe condition, the manufacturer is not liable, although "safe condition" entails "proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner." *Id.*

The parties to a strict liability suit are not confined to just the manufacturer and purchaser. According to Professor Prosser, the plaintiffs may include not only the purchaser, but "any user or consumer of the product" which may be defined as "members of [the final purchaser's] family, his guest, his employees, his lessee, and his donee." Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 817 (1966). In terms of defendants, Prosser lists as proper parties the manufacturer, the assembler of parts, the maker of component parts, and the retail dealer, although he points out that the list is not exhaustive. *Id.* at 814-16.

Finally, Prosser states that all types of products can be defective and thus at issue in a strict liability action. He notes that inherently dangerous products, such as knives, are not normally included in the definition of unreasonably dangerous and are therefore not within the purview of strict liability. If the product is "recognizably dangerous to the user or to his property" and proves to be defective, that is enough. *Id.* at 805. For additional discussion on strict liability, *see* Annot. 13 A.L.R. 3d 1057 (1967).

under fire.[9] Opponents of the doctrine argue that an action predicated upon a strict products liability theory does not inquire into the negligence or culpable conduct of the defendant, and that therefore, Federal Rule of Evidence 407,[10] the rule mandating exclusion of evidence of subsequent repairs, has no applicability to strict products liability.[11] This opposing view of Rule 407 has gained increasing acceptance, especially in the Eighth Circuit Court of Appeals, where that court has refused to apply Rule 407 in strict products liability actions.[12] The First,[13] Second,[14] Third,[15] Fourth,[16] Fifth,[17]

---

[9] *See* Ault v. Int'l Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975) (rule against subsequent repairs not applicable against manufacturer in cause of action based on strict liability). *See also infra* text accompanying notes 126-55.

[10] *See supra* note 6 for complete text of the rule against subsequent repairs.

[11] *See* Schwartz, *The Exclusionary Rule on Subsequent Repairs - A Rule in Need of Repairs*, 7 FORUM 1 (1971) [hereinafter cited as Schwartz]. Schwartz believes that the policy reasons behind Rule 407 should be tested against the experience of today's lawyers. He submits that most repairers of products do not even know of the exclusionary rule and that therefore the rule does not achieve its purpose. Furthermore, Schwartz contends that lawyers who know of the rule against subsequent repairs still advise their clients to repair injury-causing products to avoid additional lawsuits. *Id.* at 6.

Schwartz also submits that the basic policy underlying Rule 407, that of encouraging repairs, is not and never was a valid one, because there is no empirical data demonstrating that the exclusion of subsequent repair evidence has resulted in a single repair. Because he believes that Rule 407 deprives the trier of fact of crucial evidence, without "any corresponding benefit to society", Schwartz advocates that the rule against subsequent repairs be abolished. *Id.* at 7. *See also* Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837 [hereinafter cited as Note, *Products Liability*]; Comment, *Evidence of Subsequent Repairs: Yesterday, Today, and Tommorrow*, 9 U.C.D. L. REV. 421 (1976) [hereinafter cited as Comment, *Evidence*].

[12] Unterburger v. Snow Co., 630 F.2d 599 (8th Cir. 1980) (rule against subsequent repairs does not apply to actions based on strict liability); Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977) (evidence of subsequent remedial actions admissible in strict liability cause of action); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977) (evidence of subsequent remedial warning admissible in strict liability count).

[13] Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir.), *cert. denied*, 440 U.S. 916 (1978). In *Roy* the plaintiff was injured while inspecting electropladed work. The injury-causing machine was manufactured by Star Chopper Company and was provided to plaintiff's company without any safety guard or warnings of the possible dangers. The plaintiff's hand was severely damaged when it caught in the machine's punch rollers. Even after eleven operations, the plaintiff's hand had only 5% of its functioning ability. At trial plaintiff attempted to introduce evidence that Star Chopper repaired the machine after the accident. The trial court refused to admit the evidence, citing the general rule against the admission of subsequent repair evidence. On ap-

Sixth,[18] and Seventh[19] Circuits, however, continue to apply

---

peal, the First Circuit Court of Appeals affirmed the trial court's position on Federal Rule of Evidence 407 without discussion. While it may be unclear as to why the First Circuit Court of Appeals adopted the rule against subsequent repairs, it is clear that it, like the majority, has adopted the rule.

[14] Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 2036 (1982). In *Cann*, the plaintiffs, husband and wife, were injured when the car in which they were riding slipped out of the "park" gear and into "reverse." At trial they attempted to establish their strict product liability action by introducing evidence that subsequent to the plaintiffs' accident, Ford corrected the gearshift problems of the model of car that had caused the plaintiffs' injuries. Citing Federal Rule of Evidence 407, the trial court refused to admit this evidence. On appeal the Second Circuit Court of Appeals affirmed the lower court. The appellate court reasoned that although Rule 407 does not refer to strict liability, Rule 407 does encompass actions brought in strict liability. While noting that negligence and strict liability are distinguishable, "no distinction between the two justifies the admission of subsequent remedial measures in strict products liability actions." *Id.* at 60. In arriving at its decision, the Second Circuit Court of Appeals relied heavily on Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) as authority. *Werner* is considered as one of the strongest pronouncements in favor of applying Rule 407 to strict products liability actions. *See infra* notes 157-87 and accompanying text.

[15] Josephs v. Harris Corp., 677 F.2d 985 (3d Cir. 1982). In *Josephs* the plaintiff was injured while cleaning a printing press manufactured by Harris Corporation. Alleging that the press was defectively designed, the plaintiff sued on a theory of products liability. At trial the plaintiff's evidence regarding remedial action undertaken by the defendant subsequent to the plaintiff's injury was not admitted. The Third Circuit Court of Appeals affirmed the exclusion of this evidence, holding that where neither ownership, control or feasibility is in controversy, Rule 407 precludes admission of subsequent repair evidence.

[16] Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). *See infra* notes 157-87 and accompanying text for a detailed discussion of the *Werner* decision and rationale.

[17] Grenada Steel Indus. v. Ala. Oxygen Co., 695 F.2d 883 (5th Cir. 1983). In *Grenada*, a fire and explosion occurred in one of the Grenada plants. Alleging that the cause of the accident was the ignition of acetylene gas which had escaped from a faulty valve, Grenada sued Alabama Oxygen Company, the supplier of the valve. The manufacturer of the valve was also joined as a defendant. At trial the plaintiff attempted to introduce evidence that subsequent to the fire/explosion, the manufacturer changed the design of the valve. The district court excluded the evidence. On appeal the Fifth Circuit Court of Appeals, noting that the case was one of first impression, affirmed the decision of the lower court by adopting the majority position that subsequent repair evidence is inadmissible in a strict products liability action. The court set forth two reasons which led it to adopt Rule 407. First, the court stressed that voluntary change to improve a product is a policy that should be encouraged. Admission of subsequent repair evidence would effectively deter this practice, thereby encouraging a manufacturer to leave an unsafe product on the market. Second, the court expressed the opinion that subsequent repair evidence has little relevance in establishing antecedent negligence and therefore has no probative value. The Fifth Circuit Court of Appeals expressly rejected the argument that such evidence does have probative value in that a manufacturer is unlikely to alter a product

Rule 407 in strict products liability actions. The Ninth Circuit has had the issue before it, but as of yet that court has not ruled on the applicability of Rule 407 to products liability actions.[20]

In light of this controversy among the circuits, an examination of the doctrine of subsequent repairs seems appropriate. This comment will examine the evolution of the doctrine of subsequent repairs - the early case law, the codification of

---

unless the alteration is feasible and makes the product safer. The court reasoned that such an argument, made by "such dubious experts as judges, lawyers, and law professors, suffers[s] from excessive reliance on logical deduction and surmise without the benefit of evidence of industry practice or economic factors." *Id.* at 887-88. It is evident from the Fifth Circuit Court of Appeals' decision in *Grenada* that the circuit has adopted both the rule against subsequent repairs and the policy reasons that underlie it.

[18] Hall v. American S.S. Co., 688 F.2d 1062 (6th Cir. 1982). In *Hall*, the plaintiff, a seaman, was injured while working on the deck of a ship. He sought to introduce evidence that after the accident the practice of hosing down the deck was discontinued. The trial court admitted this evidence over the defendant's objection. On appeal the Sixth Circuit Court of Appeals vacated the lower court's decision, holding that Rule 407 proscribes admission of evidence of subsequent remedial measures. While noting the split in the federal courts on the applicability of Rule 407 to strict liability cases, the court was nevertheless of the opinion that subsequent repair evidence should not be admitted in strict liability actions. In so ruling the court adopted the reasoning of the Fourth Circuit Court of Appeals in Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981), *discussed infra* notes 157-87 and accompanying text. The court's decision in *Hall* affirmed its earlier decision in Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230 (6th Cir. 1980), thus confirming the Sixth Circuit Court of Appeals position on Rule 407 and strict liability.

[19] Oberst v. Int'l Harvester Co., 640 F.2d 863 (7th Cir. 1980). In *Oberst* the plaintiffs were injured as a result of a collision in a vehicle manufactured by International Harvester Company. They alleged that both the cab of the vehicle and the sleeping compartment were defectively designed. At trial the plaintiffs were not permitted to introduce evidence that subsequent to the accident the defendant changed the design of the sleeping compartment. On appeal the Seventh Circuit Court of Appeals affirmed the lower court, citing "the long established rule that proof of repairs subsequent to an accident is not admissible to prove negligence in a tort action." *Id.* at 866. It is not clear, however, whether the decision in *Oberst* was based on Rule 407 or on Illinois law; even so, the *Oberst* opinion may be read as indicating that the Seventh Circuit Court of Appeals leans toward the adoption of the majority opinion.

[20] In Longenecker v. General Motors Corp., 594 F.2d 1283 (9th Cir. 1979), the Ninth Circuit Court of Appeals was called upon to review a case involving strict liability and Rule 407. The defendant, however, did not object to the admission of subsequent repair evidence, so the court failed to "reach the question whether 'culpable conduct' for purpose of. . .[Rule 407] includes a manufacturer's strict product liability." *Id.* at 1286.

Federal Rule of Evidence 407, the exceptions to the rule, and the application of the Rule to strict products liability cases. Finally, a projection will be suggested as to the future of the doctrine itself.

I. EARLY CASE LAW

As early as the late nineteenth century, judges saw the need for a rule of evidence which would prevent the admission of evidence of post-accident repairs.[21] Courts established two basic reasons for why they believed this evidence should be inadmissible. The first reason involves relevance.[22] Evidence of remedial measures taken after an accident is irrelevant to

---

[21] *See, e.g.*, Columbia & P.S.R.R. v. Hawthorne, 144 U.S. 202 (1892). In *Columbia*, the plaintiff was injured when a pulley fell on him. At trial the plaintiff was allowed to show that after the accident the defendant changed the design of the pulley to prevent a recurrence of the accident. In reversing the lower court, the Supreme Court stated why such a rule was needed:

> [T]he taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.

Id. at 207. *Columbia*, along with Terre Haute & I.R.R. v. Clem, 123 Ind. 15, 23 N.E. 965 (1890) and Morse v. Minneapolis & St. Louis Ry., 30 Minn. 465, 16 N.W. 358 (1883), represented the reasoning followed by the majority of jurisdictions. *See infra* notes 34-59 and accompanying text.

[22] Under Federal Rule of Evidence 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. This definition of relevance is derived from the common law development of the concept. United States v. Hobson, 519 F.2d 765, 776 (9th Cir. 1975). According to the advisory committee note to Rule 401, "relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." The trial judge has broad discretion in determining what evidence is relevant and what is not. Perkins v. Volkswagen of Am., 596 F.2d 681, 682 (5th Cir. 1979); *see also* FED. R. EVID. 104(a). Because relevance is determined on a case by case basis, there are a great profusion of definitions. While not worded exactly like Rule 401, most come very close in meaning to the federal rule. Two examples suffice to illustrate this premise. In United States v. Carter, 522 F.2d 666, 685 (D.C. Cir. 1975), the court defined the test for relevancy as "whether proffered evidence has a tendency to make the existence of a fact more or less probable than would be the case without benefit of the evidence." In United States v. Allison, 474 F.2d 286, 289 (5th Cir. 1973), the court held that evidence is relevant "when it is persuasive or indicative that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from that evidence."

the issue of a defendant's conduct prior to the accident.[23] The defendant's conduct immediately prior to the accident is the type of evidence which is probative of whether the defendant breached his duty of care.[24] Because it is this evidence which is at issue, evidence of post-accident repairs has little probative value, for it is just as likely that an injury was caused by accident, contributory negligence, or any other logical reason as it was by the instrumentality the defendant subsequently altered.[25] Furthermore, evidence of subsequent repair can be highly prejudicial, because jurors are apt to construe the subsequent change as an admission of guilt by the defendant, even if admitted with a proper limiting instruction.[26]

The second reason evidence of post-accident repair is usually excluded is the one relied upon most frequently by the courts. The public policy of encouraging, or at least not discouraging, manufacturers to take remedial safety measures has been of great concern to courts in maintaining the doctrine.[27] If evidence of subsequent repairs is admissible, a defendant, knowing that any improvement he makes in a product may be used as evidence that that product was previously unsafe, would be extremely unlikely to improve any product.[28]

---

[23] C. McCORMICK, *supra* note 5; J. WIGMORE, *supra* note 5.

[24] Comment, *Ault v. International Harvester Co. - Death Knell to the Exclusionary Rule Against Subsequent Remedial Conduct in Strict Products Liability*, 13 SAN DIEGO L. REV. 208, 210 (1975) [hereinafter cited as Comment].

[25] *See* C. McCORMICK, *supra* note 5; J. WIGMORE, *supra* note 5. *See also* Columbia & P.S.R.R. v. Hawthorne, 144 U.S. 202, 207 (1892) ("[T]he taking of such precautions against the future. . .has no legitmate tendency to prove that the defendant had been negligent before the accident happened. . . ."); Morse v. Minneapolis & St. Louis Ry., 30 Minn. 465, 16 N.W. 358, 359 (1883) (subsequent repairs "afford no legitimate basis for construing such an act as an admission of previous neglect of duty.").

[26] J. WIGMORE, *supra* note 5, *cited in* Note, *Products Liability*, *supra* note 11, at 841.

[27] C. McCORMICK, *supra* note 5; J. WIGMORE, *supra* note 5, Comment, *An Exception to the Exceptions: The Subsequent Repair Rule in Montana*, 42 MONT. L. REV. 143, 145 (1981).

[28] J. WIGMORE, *supra* note 5. Wigmore was a leading advocate for the exclusion of evidence of post-accident repair on this ground:

> [T]he admission of [post-accident repairs], even though theoretically not plainly improper, would be liable to over-emphasis by the jury, and would discourage all owners, even those who had genuinely been careful, from improving the place or thing that had caused the injury, because they would fear the evidential use of such acts to their disad-

For this reason, courts have excluded evidence not only of post-accident repair, but also of installation of safety devices,[29] changes in company rules,[30] and discharge of employees.[31] The exclusion of evidence in these circumstances is further justified when one considers that a manufacturer may change a product for reasons other than safety. Functional, aesthetic, and economic factors are all plausible explanations of a change in design.[32]

Three cases from the latter part of the nineteenth century set the groundwork for the exclusionary rule against subse-

---

> vantage; and thus not only would careful owners refrain from improvements, but even careless ones, who might have deserved to have the evidence adduced against them, would by refraining from improvements subject innocent persons to the risk of the recurrence of the injury.

Id.

[29] *See, e.g.*, Hatcher v. Globe Union Mfg. Co., 170 Wash. 494, 16 P.2d 824 (1932). In *Hatcher*, plaintiff suffered lead poisoning as a result of ingesting lead particles at work. At trial he was permitted to show that after the incident the defendant installed a blower to alleviate the lead poisoning problem. The appellate court reversed the lower court's decision to admit the evidence, holding that the general rule against subsequent repairs prohibited the admission of such evidence. The court expressed the opinion that subsequent alterations have no tendency whatever to show that the conditions were unsafe prior to the accident.

[30] *See, e.g.*, Ware v. Boston & M.R.R., 92 N.H. 373, 31 A.2d 58 (1943). In *Ware*, the plaintiff's decedent died in a collision between a truck and train. The trial court excluded testimony that following the accident, the defendant adopted a traffic regulation limiting the speed at which its trains may cross intersections. On appeal, the court affirmed the exclusion of the testimony, holding that "[w]hatever defendent may have done after the accident, as an additional safeguard for the protection of the traveling public against a recurrence of such accident as this one, is not evidence of previous negligence or fault on the part of the defendant. . . ."31 A.2d at 60.

[31] *See, e.g.*, Armour & Co. v. Skene, 153 F. 241 (1st Cir. 1907). In *Armour* the plaintiff was injured when a runaway team collided with a buggy in which he was sitting. At trial the plaintiff was allowed to show that the driver of the team was fired after the accident. On appeal, the decision of the lower court was affirmed. The court noted, however, that the admission of the evidence was technical error, but not of such import as to require reversal of the trial court. In determining that the evidence should have been excluded, the court pointed out that "a hundred things may have happened during the year to cause the discharge. It may have been that he was discharged because he was profane, or because he advised co-employees to demand more pay or less hours." *Id.* at 245.

[32] Ault v. Int'l Harvester Co., 13 Cal. 3d 113, 125, 528 P.2d 1148, 1155, 117 Cal. Rptr. 812, 819 (1975) (Clark, J., dissenting), *cited in* Comment, *supra* note 24, at 211. *See also* V. WALKOWIAK, THE TRIAL OF THE PRODUCTS LIABILITY CASE 2-8 (1982) [hereinafter cited as V. WALKOWIAK].

quent repairs.[33] In *Columbia & Puget Sound Railroad v. Hawthorne*, [34] an employee of the defendant saw-mill corporation was injured when a large pulley fell upon him.[35] The employee sued the defendant on a theory of negligence for failure to provide a safe and non-defective machine.[36] At trial the employee was permitted to show that the defendant had changed the design of the machine to prevent the same accident from recurring.[37] The Supreme Court, in reversing the lower court, which had allowed the evidence into the record, cited both precedent and policy as reasons for prohibiting the admission of the evidence.[38]

Specifically, the Court relied upon the relevance theory[39] in arriving at its decision. It held that the evidence is incompetent because "the taking of such precautions [subsequent repairs] against the future is not to be construed as an admission of responsibility for the past."[40] The Court reasoned that the English rule, espoused by Baron Bramwell in *Hart v. Lancashire & Yorkshire Railway*,[41] should be equally applicable in America, that "people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident."[42]

In *Terre Haute & Indiana Railroad v. Clem*,[43] the plaintiff's horse was injured at a crossing of a public road and a railroad track.[44] Plaintiff sued the defendant railroad company in negligence for breach of duty in constructing the crossing.[45] The trial judge permitted the plaintiff to show that after the accident, the railroad company changed and repaired

---

[33] C. McCORMICK, *supra* note 5.
[34] 144 U.S. 202 (1892).
[35] *Id.*
[36] *Id.*
[37] *Id.* at 203.
[38] *Id.* at 206-09. The Court relied heavily on Morse v. Minneapolis & St. L. Ry., 30 Minn. 465, 16 N.W. 358 (1883), *discussed infra*, notes 52-57 and accompanying text.
[39] *See supra* note 22 for discussion of the relevance theory.
[40] *Columbia*, 144 U.S. at 207 (1892).
[41] 21 L.T.R. n.s. 261 (1869).
[42] *Id.* at 263.
[43] 123 Ind. 15, 23 N.E. 965 (1890).
[44] 23 N.E. at 965.
[45] *Id.*

the crossing.[46] Judgment for the plaintiff was reversed by the appellate court on the ground that acts of post-accident repairs afford no legitimate basis for construing such an act as an admission of previous neglect of duty.[47] A defendant's conduct, the court said, is to be measured prior to the accident, not after, for "no one is bound to anticipate and to provide against unusual and unexpected accidents."[48]

In arriving at its decision, the appellate court cited the policy reasons behind the rule against subsequent repair as demanding such a result. First, the court held that evidence of post-accident repairs is irrelevant to the issue of the negligence of the defendant prior to the accident, a conclusion which is supported by well-settled principles.[49] Second, the court reasoned that defendants would be discouraged from repairing products if evidence of subsequent repairs were admissible.[50] Such a rule that admits evidence of subsequent repairs operates to ". . . deter men from profiting by experience, and availing themselves of new information" and "has nothing to commend it, for it is neither expedient nor just."[51]

In *Morse v. Minneapolis & St. Louis Railroad*, [52] a railroad company was sued for negligence in maintaining its track, an act which allegedly resulted in the death of one of its engineers.[53] At trial, the plaintiff was allowed to show that after the accident, the defendant repaired the allegedly defective

---

[46] *Id.* at 966.

[47] *Id.*

[48] *Id.*

[49] *Id.* The court relied on Morse v. Minneapolis & St. L. Ry., 30 Minn. 465, 16 N.W. 358 (1883), and Nalley v. Hartford Carpet Co., 51 Conn. 524 (1884) as establishing the "well-settled principle." 23 N.E. at 966.

[50] *Id.* The court cited an example of a mill owner who repairs or improves the mill after an accident has occurred. The court stated that the "just inference is not that he was previously guilty of negligence, but that, prompted by humane motives and influenced by the new information supplied by the fact that an accident has happened, he has. . . taken such precautionary measures as to render it impossible that any one should be injured in the future." *Id.*

[51] *Id.*

[52] 30 Minn. 465, 16 N.W. 358 (1883).

[53] 16 N.W. at 358.

switch.[54] The jury returned a verdict in favor of the plaintiff.[55] The appellate court concluded that the admission of the evidence of subsequent repairs amounted to reversible error, holding that to allow evidence of post-accident repair would be to hold out "an inducement for continued negligence."[56]

The court determined that evidence of subsequent repair "afford[s] no legitimate basis for construing such an act as an admission of previous neglect of duty."[57] As such evidence pertaining to post-accident repairs is irrelevant to the defendant's antecedent negligence, and is therefore inadmissible.

These three cases are representative of the holdings of every jurisdiction under common law except for one.[58] The courts were firmly convinced that evidence of post-accident repairs was incompetent and therefore inadmissible to show a defendant's antecedent negligence because such evidence had no bearing on the conduct of the defendant prior to the accident and tended to inflame the jury against the defendant.[59] Ex-

---

[54] *Id.* at 359.

[55] *Id.*

[56] *Id.* The court, in one of the most frequently quoted opinions on subsequent repairs, explained why such evidence should be excluded:

> A person may have exercised all the care which the law required, and yet in light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.

Id.

[57] *Id.*

[58] Comment, *Evidence*, *supra* note 11, at 421. The author states that while every jurisdiction in the United States had a common law rule against subsequent repairs except Kansas, not all of these jurisdictions adopted the rule *per se* when they codified their evidence law. For examples of three such statutes, *see* MAINE EVID. 407(a), HAWAII R. EVID. 407 and ALASKA R. EVID. 407.

At common law Kansas refused to exclude evidence of subsequent repairs. However, it adopted the federal rule against subsequent repairs when it enacted its state rules of evidence. *See* KAN. CIV. PROC. CODE ANN. § 60-451 (Vernon 1976).

[59] *See, e.g.*, Sanderson v. Berkshire-Hathaway, Inc., 245 F.2d 931 (2d Cir. 1957) (evidence of subsequent repairs of step by landlord inadmissible as proof of negligence); Northwest Airlines v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir.), *cert denied*, 350 U.S. 937 (1955) (reports of experiments conducted following an accident inadmissible because of possible misuse by jury).

cept for a few judicial exceptions,[60] courts adhered to this common law rule of evidence until 1975.

II. FEDERAL RULE OF EVIDENCE 407

In 1975, Congress enacted the Federal Rules of Evidence. Among the rules enacted was Federal Rule of Evidence 407, entitled "Subsequent Remedial Measures."[61] Part of Congress' intent in codifying Rule 407 was to transform the vast common law development of the doctrine of subsequent repairs into a single rule,[62] which now reads as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.[63]

In enacting Rule 407, however, it was intended that the common law doctrine of subsequent repair complement the federal rule, thus allowing prior judicial decisions to fill the gaps that were certain to appear.[64]

---

[60] Examples of judicial exceptions to the general rule against subsequent repairs are as follows: (1) evidence of change in policy, *see* Dorssom v. Kansas Power & Light Co., 174 Kan. 472, 257 P.2d 151 (1953) (evidence of subsequent change in policy held admissible in negligence action); (2) evidence to show duty to repair, *see* Wallner v. Kitchens of Sara Lee, 419 F.2d 1028 (7th Cir. 1969) (*discussed infra* notes 72-78 and accompanying text); (3) evidence of repairs made by third party, *see* Brown v. Quick Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969) (*discussed infra* notes 89-96 and accompanying text); (4) evidence to establish control of instrumentality, *see infra* notes 71-82 and accompanying text; (5) evidence to establish feasibility of precautionary measure, *see infra* notes 83-97 and accompanying text; and (6) evidence to impeach, *see infra* notes 98-113 and accompanying text.

[61] FED. R. EVID. 407.

[62] K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL, 162-65 (2d ed. 1977); FED. R. EVID. 407 advisory committee note.

[63] FED. R. EVID. 407.

[64] This view was espoused by the Fourth Circuit in Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). The court held that:

> It is clear that in enacting the Federal Rules of Evidence Congress did not intend to wipe out the years of common law development in the field of evidence, indeed the contrary is true. The new rules contain

Perhaps the more important reason why Rule 407 was codified was that gaps were already beginning to appear in the common law doctrine and the rule against subsequent repair had begun to lose its vitality.[65] These gaps were in the form of prominent exceptions to the exclusionary rule and uneven application of the doctrine by the courts, causing the rule to be seen by some as a positive rule of admissibility rather than a rule of exclusion. Unless the issue is defendant's negligence, the criticism goes, evidence of subsequent repairs will always be admissible.[66]

The second sentence of Rule 407 specifically enumerates the exceptions to the rule: "This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."[67] According to the advisory committee note to Rule 407, the list of exceptions to the rule is not exhaustive, but merely illustrative.[68] Other widely-accepted exceptions included the duty of the defendant to repair[69] and changes made by a third party who is not the defendant.[70] A brief ex-

---

> many gaps and omissions and in order to answer the unresolved questions courts certainly should rely on common law precedent. This is true with respect to Rule 407 which merely enacts the common law rule.

Id. at 856 (citation omitted).

For examples of the courts' application of Rule 407, see *supra* notes 13-18.

[65] Schwartz, *supra* note 11. The commentator states that the rule against subsequent repairs is so eroded that it could not "achieve the worthwhile policy goal it purports to accomplish. . . ."*Id.* at 7.

[66] See Wallner v. Kitchens of Sara Lee, 419 F.2d 1028, 1032 (7th Cir. 1979) *cited in* Note, *Products Liability, supra* note 7, at 895. The court stated: "Evidence of post-accident repairs or changes is properly introduced for any purpose except to demonstrate the negligence of the defendant." 419 F.2d at 1032.

[67] FED. R. EVID. 407.

[68] FED. R. EVID. 407 advisory committee note; Werner v. Upjohn Co., 628 F.2d 848, 856 (4th Cir. 1980), *cert denied,* 449 U.S. 996 (1981) (stating that "the exceptions listed in Rule 407 - ownership, control or feasibility of precautionary measures (if controverted), and impeachment are illustrative and not exhaustive." *Id.*

[69] Wallner v. Kitchens of Sara Lee, 419 F.2d 1028 (7th Cir. 1969) (evidence of subsequent repairs properly admitted to indicate defendant possessed a duty to repair); Otts v. Brough, 90 Idaho 124, 409 P.2d 95 (1965) (evidence is admissible to show a defect which the defendant had a duty to repair).

[70] *See, e.g.,* Louisville & N.R.R. v. Williams, 370 F.2d 839 (5th Cir. 1966) (evidence

amination of the major exceptions to Rule 407 will demonstrate what remains of the vitality of the rule against subsequent repairs.

A. *Control/Ownership*

Federal Rule of Evidence 407 specifically allows admission of evidence of subsequent measures offered to show that the defendant had control or ownership of the premises or instrumentality involved in the accident.[71] For example, in *Wallner v. Kitchens of Sara Lee*,[72] plaintiff was allowed to present evidence that showed that Sara Lee had subsequently repaired the allegedly defective machinery.[73] In *Wallner*, plaintiff was injured when his hand caught in a vertical conveyer unit used in defendant's kitchen.[74] He sued Sara Lee on a theory of negligence.[75] At trial the plaintiff was permitted to show that Sara Lee made several alterations in the conveyor unit, installing a safety guard and adding extra lubricators.[76] On appeal, the decision to admit the evidence was affirmed.[77] The court held that, while normally post-accident repair evidence is excluded, in this instance the evidence was admissible, for control of the machine was a controverted issue, and the evidence established that Sara Lee had control of the conveyor.[78] One must take note, however, that when evidence is admitted for the limited purpose of establishing control or ownership, it is not to be construed by the jury as an admission of defendant's fault.[79] Upon request, a defendant can obtain an instruction limiting the use of such evidence to the issue for

---

of subsequent repairs made by a municipality admissible when evidence has no bearing on defendant's negligence); Brown v. Quick Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969) (evidence of subsequent repairs by plaintiff's employer admissible when employer not joined as defendant).

[71] FED. R. EVID. 407; 32B Am. Jur. 2d *Federal Rules of Evidence* § 139 (1982).

[72] 419 F.2d 1028 (7th Cir. 1969).

[73] *Id.* at 1032.

[74] *Id.* at 1031.

[75] *Id.*

[76] *Id.* at 1032.

[77] *Id.*

[78] *Id.*

[79] C. MCCORMICK *supra* note 5.

which it is admitted.[80] The danger in admitting this type of evidence under any of the exceptions to the general rule is that the jury may ignore the instruction and perceive the evidence of the subsequent repairs as an admission of prior negligence.[81] In spite of this danger, however, evidence has consistently been admitted to establish control or ownership.[82]

B. *Feasibility of Precautionary Measures*

The second, and probably most controversial of the exceptions to the rule against subsequent repairs involves the feasibility of precautionary measures.[83] Evidence of subsequent repairs is admissible to prove feasibility of precautionary measures when the defendant denies that such a precaution was actually feasible.[84] One commentator, however has sug-

---

[80] *Id.*

[81] Note, *Products Liability supra* note 11, at 850; *see also* Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 233 (6th Cir. 1980) (failure of trial court to give limiting instruction after admitting subsequent repair evidence reversible error).

[82] *See, e.g.*, Landrum v. DeBruycker, 240 N.W.2d 119 (1976) (evidence of post-accident repairs admitted in negligence action where plaintiff was injured when his Volkswagen collided with a cow; the court permitted the evidence to be admitted, stating that "the admission of such evidence to establish control . . . can be highly prejudicial and remains within the discretion of the trial judge.") *see also* Powers v. J.B. Michael & Co., 329 F.2d 674 (6th Cir. 1964) (evidence of subsequent repairs admissible to establish defendant's control of premises); Dubonowski v. Howard Savings Inst., 124 N.J.L. 368, 12 A.2d 384 (1941) (evidence of landlord's subsequent repair of stairs admissible to show landlord's control of the stairs); Scudero v. Campbell, 288 N.Y. 328, 43 N.E.2d 66, (1942) (subsequent repair of stairs admissible to show landlord's control of building).

[83] The reason this exception is so problematic is that feasibility must actually be controverted before evidence of it is admissible. *See* FED. R. EVID. 407. Problems arise as to when feasibility is actually at issue, for when feasibility is not stipulated, often the trial must be fully developed before the determination of controverted feasibility may be made. By that time damaging evidence of post-accident repairs may already have been admitted to establish feasibility. If the defendant stipulates that a certain change was feasible, evidence of subsequent repair can never be admissible on that premise. An example of this is found in Burks v. Firestone Tire & Rubber Co., 633 F.2d 1152 (5th Cir. 1981), where the court, after noting that the defendants agreed with the plaintiff that an alternative design was feasible, stated, "[D]efendants entered the stipulation to gain the benefit of Federal Rule of Evidence 407, which excludes evidence of subsequent remedial measures to prove the feasibility of taking such measures at the time of an accident if feasibility is not controverted." *Id.* at 1153.

[84] *See, e.g.*, C. MCCORMICK *supra* note 5, § 275 n.21 (listing cases holding evidence of post-accident repairs admissible on this basis).

gested that such a denial would be imprudent, because usually the defendant knows the repairs were made.[85] While a defendant can cut off the plaintiff's attempt to introduce such evidence by admitting feasibility,[86] this should not be done haphazardly. Not only must the stipulation of feasibility conform completely to the plaintiff's evidence,[87] but also there is a distinct possibility that the evidence nevertheless may be admitted under another exception.[88] The possibilities of abuse of this exception are very real. In *Brown v. Quick Mix Co.*,[89] the Washington state court held that evidence of post-accident repair is admissible no matter which side raises the issue of precautionary measures. In *Brown*, the plaintiff lost three fingers and part of his right hand when his hand was caught in an earth-boring drill.[90] The plaintiff sued both the manufacturer and retailer in strict products liability.[91] At trial the plaintiff was permitted to show that on the day of the accident the plaintiff's employer installed a safety guard on the drill to prevent a recurrence of the accident.[92] The trial court admitted this evidence to show feasibility of guarding the drill.[93] Before the trial, the defendant had admitted the feasibility of such a safety device so the issue was not in controversy.[94] The appellate court affirmed the admission of this evidence, hold-

---

[85] Lloyd, *Admissiblility of Evidence of Post Accident Repairs: The Graying of a Black Letter Rule*, 25 DRAKE L. REV. 400 (1975). Lloyd goes on to say that the defendant need not plead unfeasibility for the issue to be raised; he cites one case where plaintiff was allowed to use subsequent repair evidence to rebut a statement in defendant's opening argument concerning feasibility. *Id.*

[86] *See supra* note 83. *See also* Burks v. Firestone Tire & Rubber Co., 633 F.2d 1152 (5th Cir. 1981) (defendant stipulated feasibility of design alternative to gain benefit of Rule 407).

[87] Lloyd, *supra* note 85, at 405.

[88] *Id.*

[89] 75 Wash. 2d 833, 454 P.2d 205 (1969).

[90] 454 P.2d at 207. Plaintiff's job entailed manually guiding the drill to a particular position for drilling a hole. Once the drill was in position, a crane lowered the drill into the hole while plaintiff guided it with his hands. *Id.*

[91] *Id.*

[92] *Id.* The guard was in the shape of a truncated cone, which when welded onto the drill, permitted the drill to be guided into position without the operator actually touching the drill itself, while at the same time not hampering its use. *Id.*

[93] *Id.*

[94] *Id.*

ing that because the plaintiff's employer, not a party to the lawsuit, had made the subsequent repair, there was no danger that the jury would construe the repair as an admission of the defendants' negligence.[95] The dissenting judge in *Brown* attacked the majority's decision for improperly allowing the plaintiff to "initially inject evidence of feasibility", into the trial enabling the jury to find the defendants negligent "on evidence admitted on an issue [the defendants] neither created nor contested."[96] Despite the dangers apparent in *Brown*, feasibility remains readily available as a vehicle for introducing evidence of post-accident repairs.[97]

C. *Impeachment*

Federal Rule of Evidence 407 allows the admission of evidence of subsequent repairs for purposes of impeaching witnesses or testimony.[98] When a defendant asserts that all reasonable care had been exercised at the time of an occurrence, the plaintiff may attack that contention by showing later repairs inconsistent with the defendant's assertion.[99] Admission under this exception may take a variety of forms. According to one commentator, "where the evidence of repairs tends to contradict or impeach on a material point it will be admissible."[100] An example of the admission of evidence of subsequent repairs under the impeachment exception is found in

---

[95] *Id.* at 210. The court opined that since the defendants had not made the repairs, "the fact that such changes were made could not conceivably raise in the minds of the jury an inference that the appellant [defendant] had admitted it was negligent. . . ." *Id.*

[96] *Id.* at 211.

[97] *See, e.g.*, Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961) (plaintiff permitted to show specific changes made by defendant although defendant had previously admitted that such changes were possible; so long as the final emphasis was on the defect, such evidence would not incriminate the defendant in a negligence action).

[98] 38B Am. Jur. 2d *Federal Rules of Evidence* § 141. (1982) See Lloyd, *supra* note 85, at 404 for a brief discussion of admissibility under this exception.

[99] *See, e.g.*, Hatfield v. Levy Bros., 18 Cal. 2d, 798, 117 P.2d 841 (1941) (plaintiff permitted to show on cross-examination that defendant's earlier contention about safety was false through use of evidence of subsequent repair); Hickey v. Kansas City S. Ry., 290 S.W.2d 58 (Mo. 1956) (evidence of subsequent repair of railroad crossing admissible to rebut defendant's contention that repair was impossible).

[100] Lloyd, *supra* note 85, at 404 (citing a variety of Iowa cases admitting post-accident repairs for impeachment purposes).

American Airlines, Inc. v. United States.[101] In that case the plaintiff's decedent died when the airplane in which he was a passenger crashed while making a landing.[102] The plaintiff sued American Airlines for negligence.[103] At trial plaintiff was permitted to use evidence of subsequent repairs to rebut the testimony of defendant's witnesses concerning feasibility and safety.[104] Specifically, plaintiff was allowed to prove that American had changed the face of the drum type altimeter, one of three altimeters in use on board the airplane at the time of the crash.[105] This evidence was crucial to the lawsuit, for it helped the plaintiff establish that the pilot had been negligent in that he had read the incorrect altimeter on approach to land, and that therefore American was liable.[106] Plaintiff was also allowed to introduce evidence that following the accident, American changed the pilots' cockpit procedure.[107] American objected to the admission of this evidence on the ground that evidence of subsequent remedial action is inadmissible to prove antecedent negligence.[108] The Fifth Circuit affirmed the district court's ruling admitting the evidence, for the appellate court opined that the evidence was used to impeach earlier testimony stating that the changes were unfeasible.[109] Evidence of the alteration of the drum type altimeter was properly admitted to rebut defendant's testimony that the original instrument was not only safe, but that there was also no reason to change its design.[110] Furthermore, evidence of the addition of the extra pilot in the cockpit was

---

[101] 418 F.2d 180 (5th Cir. 1969).

[102] *Id.* at 182-83.

[103] *Id.*

[104] *Id.* at 196.

[105] *Id.* All three altimeters are mounted on the same panel in a Boeing 727, the airplane involved in this crash. Altimeters one and two are set to indicate the altitude of the aircraft above the airport. Altimeter number three indicates altitude above mean sea level. *Id.*

[106] *Id.* at 188.

[107] *Id.* at 196-97. This evidence was especially damaging to American, for through it plaintiff was able to establish that since the crash, American requires an additional pilot in the cockpit on each flight. *Id*

[108] *Id.*

[109] *Id.*

[110] *Id.*

properly admitted to rebut the testimony of an American Airlines pilot that such procedure was unfeasible.[111] Because the evidence of American's subsequent remedial actions was offered to impeach contradictory testimony, the Fifth Circuit concluded that the evidence came within the impeachment exception and was therefore properly admitted.[112] Similar to the exceptions which allow proof of control/ownership and feasibility, the exception to the rule against subsequent repairs based on impeachment has enjoyed wide-spread usage. This wide-spread usage of the impeachment exception has caused some commentators to urge that the general rule against admissibility of evidence of subsequent repairs be abolished.[113]

In light of the recognized exceptions to the rule against subsequent repairs, it appears that an attorney of even minimal ingenuity can find some way to admit evidence of subsequent repairs.[114] Professor McCormick warned, however, that the free admission of evidence of subsequent remedial measures is likely to defeat the public policy of encouraging repairs.[115] Others contend that the social policy is unsupportable or no longer relevant.[116] Almost all agree that the rule against subsequent repairs has lost much of its vitality.[117]

---

[111] *Id.* at 196-97.

[112] *Id.* at 196.

[113] *See* Schwartz, *supra* note 11, at 7.

[114] J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE 407-10 (1975) *cited in* Comment, *Evidence*, *supra* note 11, at 424-25 n.29: "As Professor Slough observed: 'Opportunities for circumscribing the purpose of the rule are legion, and it is quite evident that admission or exclusion will be judged on the basis of subtle trial manuevers. . . .'"

[115] C. MCCORMICK, *supra* note 5. McCormick suggests that before such evidence is admitted under any of the exceptions the court should be satisfied that the issue on which it is offered is of substantial importance, and is actually, and not merely formally in dispute, that the plaintiff cannot establish the fact to be inferred conveniently by other proof, and consequently that the need for the evidence outweighs the danger of its misuse. *Id.*

[116] *See* Schwartz, *supra* note 11, at 6.

[117] *See, e.g.*, C. MCCORMICK, *supra* note 5; Schwartz, *supra* note 11, at 7; Comment, *supra* note 24, at 230.

III. Rule 407 and Strict Products Liability

Recently, with the development of the strict products liability theory, the rule against admission of evidence of subsequent remedial action has been weakened even further. As discussed above, evidence of subsequent remedial measures is inadmissible to prove negligence or culpable conduct.[118] A major question has arisen as to whether the rule against subsequent repairs is applicable to strict products liability actions, where negligence and culpable conduct are not at issue.[119] In order for a plaintiff to establish a cause of action in strict products liability, he must show that the product was defective, that the defendant had control over the product when the defect occurred, and that the product caused the plaintiff's injuries.[120] In a strict liability action the manufacturer is not on trial, but rather the product itself.[121] The manufacturer's conduct is irrelevant in strict liability; only the product's defectiveness, control of the product when the defect occurred, and causation between the plaintiff's injury and the defect need be established.[122] As such, evidence which helps to establish any of the elements of strict liability should be admitted. Because negligence is not at issue, a defendant need not worry that evidence of subsequent repairs will be seen as an admission of fault.[123] Therefore, evidence of post-accident repairs is relevant to establish a defect in the product by showing the availability of safer alternatives or that a higher

---

[118] *See supra* notes 34-57 and accompanying text.

[119] The basic theory of strict liability is set forth in Restatement (Second) of Torts § 402A (1965). For text of Section 402A, see *supra* note 8.

[120] See *supra* note 8 for a general discussion of strict liability.

[121] Lloyd, *supra* note 85, at 408. Lloyd asserts that when the product itself is on trial, the fact of a repair having been made subsequently bears directly on the issues of defectiveness and control by the defendant over the product. *Id.* at 408-09. *See also* Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 319, 281 N.E.2d 749, 753 (1972), *cited in* Note, *Subsequently Remedying Strict Products Liability: Cann v. Ford*, 14 Conn. L. Rev. 759, 769 (1982)[hereinafter cited as Note, *Subsequently Remedying*] ("[In strict liability] policy considerations are involved which shift the emphasis from the defendant manufacturer's conduct to the character of the product").

[122] *See supra* note 8.

[123] Note, *Products Liability*, *supra* note 11, at 846.

level of safety was attainable by the defendant.[124] This type of evidence is also probative of the extent of the defendant's control over the product, for if a defendant subsequently repairs a product, it follows that he must have had the defect under his control. [125] When plaintiff sues on a strict liability theory, evidence of post-accident repairs may be very helpful in determining the elements of strict liability.

A. *The Case Against Applying Rule 407 to Strict Products Liability: Ault v. International Harvester Co.*

In *Ault v. International Harvester Co.*, [126] the California Supreme Court, a leading advocate of strict products liability,[127] considered a case in which the plaintiff was seriously injured when the vehicle in which he was a passenger plunged 500 feet to the bottom of a canyon.[128] After the accident, it was discovered that the vehicle's gear box had broken.[129] The plaintiff contended that the gear box had broken prior to the accident, and the defendant claimed the box had broken on impact.[130] The plaintiff sued under the theories of negligence, strict products liability and breach of warranty.[131] The plaintiff supported his contention by showing that the gear box was made of an inferior metal and offered into evidence the fact that three years after the accident the defendant had substituted a much stronger metal in the construction of gear boxes for vehicles like the one in question.[132] The trial court accepted this evidence into the record.[133]

On appeal, the defendant asserted that the admission of the evidence violated the California rule against proof of subse-

---

[124] Lloyd, *supra* note 85, at 409.

[125] *Id.*

[126] 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975).

[127] What is generally acknowledged as the first strict products liability case was decided in California. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). *See supra* note 8 for a discussion of *Greenman.*

[128] *Ault*, 13 Cal. 3d at 110, 528 P.2d at 1150, 117 Cal. Rptr. at 814 (1975).

[129] *Id.*

[130] *Id.*

[131] *Id.* at 110, 528 P.2d at 1149, 117 Cal. Rptr. at 813.

[132] *Id.* at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814.

[133] *Id.*

quent repairs.[134] The state supreme court, however, refused to accept the defendant's position, holding that the language and legislative history of the California rule made the doctrine inapplicable to a strict products liability action.[135] The court then refused to judicially extend the rule against subsequent repairs to strict products liability actions.[136]

In overruling the defendant's contention that the California rule against subsequent repairs should be applicable in strict products liability actions, the *Ault* court employed a two-part analysis.[137] The first part involved the distinction between strict liability and negligence. Negligence, the *Ault* court stated, involves affirmative fault, a term specifically related to "culpable conduct",[138] the phrase employed in Federal Rule of Evidence 407 to describe conduct for which post-accident repair evidence is inadmissible.[139] Affirmative fault, however, is not considered in a strict liability action, and hence culpable conduct is irrelevant. Therefore, Federal Rule of Evidence 407 is inapplicable to strict liability.[140] Instead, a court should focus on whether the product was defective, an issue which is less blameworthy than culpable conduct.[141] The *Ault* court reasoned that had the California Legislature intended to encompass strict liability cases within the scope of the California rule against subsequent repairs, it would have used a term less related to and consistent with affirmative fault than "culpable conduct."[142]

---

[134] CAL. EVID. CODE § 1151 (West 1968). The California rule reads substantially like FED. R. EVID. 407. The California rule was used as a model in drafting the federal rule. FED. R. EVID. 407 advisory committee note.

[135] *Ault*, 13 Cal. 3d at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814 (1975).

[136] *Id.* The California Supreme Court opined that the California Legislature did not specifically mention strict products liability in enacting its rule against subsequent repairs and that therefore the court was not compelled to apply the rule in strict products liability actions. *Id.*

[137] *Id.* at 118-19, 582 P.2d at 1150-51, 117 Cal. Rptr. at 814-15 (1975).

[138] *Id.*

[139] FED. R. EVID. 407.

[140] *Ault*, 13 Cal. 3d at 118-20, 528 P.2d at 1150-51, 117 Cal. Rptr. at 815-16.

[141] *Id.*

[142] *Id. But see* Comment, *supra* note 24, at 214 for an opposite but equally valid reading of the Legislative intent behind the passing of California's rule against subsequent repairs. Under this reading, culpable conduct is sufficiently broad to apply to strict liability. *Id.* at 214-15.

The second part of the California Supreme Court's analysis involved the widely-accepted policy reason for the rule, that of encouraging repairs.[143] While acknowledging that in negligence actions a defendant may be deterred from making repairs if such evidence could be admitted against him, the *Ault* court opined that that particular policy reason was immaterial in a products liability action.[144] One reason for this is the fact that the theory of strict liability itself encourages defendants to make repairs.[145] The exclusionary rule would serve only to circumvent this policy. If the plaintiff cannot get evidence of subsequent repairs admitted, he may have difficulty making out his case, and the defendant will have no reason to repair.[146]

The other reason given by the *Ault* court for the admission of evidence of subsequent repairs in strict liability actions is that there are other, more persuasive reasons which encourage a defendant to repair, and that the subsequent repair rule is not necessary.[147] Economic considerations and the threat of adverse publicity are two reasons why a defendant might subsequently repair.[148] An even more compelling reason why a defendant will normally repair a product after a lawsuit-causing incident is to avoid additional lawsuits.[149] Moreover, the *Ault* court said, the exclusionary rule does not affect the primary conduct of the mass producer of goods, but serves merely as a

---

[143] *Ault*, 13 Cal. 3d at 119, 528 P.2d at 1151, 117 Cal. Rptr. at 815 (1975).

[144] *Id.*

[145] *Id. See also* Comment, *Evidence*, *supra* note 11, at 429.

[146] *Ault*, 13 Cal. 3d at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816 (1975); Note, *Products Liability*, *supra* note 11 at 848.

[147] *Ault*, 13 Cal. 3d at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816 (1975).

[148] *Id.*

[149] The court's language is particularly effective in explaining why a defendant will subsequently repair even if such evidence could be admitted against him:

> The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery of an injury that preceded the improvement.

Id.

shield against potential liability.[150]

Although the California Supreme Court need not have held that the rule against subsequent repairs was inadmissible in a strict liability action,[151] in *Ault v. International Harvester Co.*,[152] it once again asserted itself as the forerunner in the field of products liability. While the holding in *Ault* is still in the minority, it has gained the support of the Eighth Circuit. The *Ault* rationale has been applied consistently by that circuit in the following cases: *Unterberger v. Snow Co., Inc.*,[153] *Farner v. Paccar, Inc.*,[154] and *Robbins v. Farmers Union Grain Terminal Assoc.*.[155]

B. *The Case for Applying Rule 407 to Strict Products Liability: Werner v. Upjohn Co.*

A majority of the circuits, however, still choose not to follow the *Ault* rationale and continue to apply the rule against subsequent repairs to strict liability actions.[156] The Fourth Circuit's decision in *Werner v. Upjohn Co.*[157] perhaps best illustrates the proposition that the rule against subsequent repairs is applicable to strict liability actions. The *Werner* case serves as an excellent summary of the position presently taken by the majority of jurisidictions.[158]

In *Werner*, the product at issue was a drug called Cleocin, a broad spectrum antibiotic.[159] Cleocin enjoyed wide usage in the early 1970's as a substitute for penicillin.[160] As usage be-

---

[150] *Id. See also* Comment, *Evidence, supra* note 11 at 429; Note, *Products Liability, supra* note 11 at 845-52.

[151] According to one author, the evidence in *Ault* could have been admitted under the feasibility exception. *See* Comment, *Evidence, supra* note 11, at 427.

[152] 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975).

[153] 630 F.2d 599 (8th Cir. 1980).

[154] 562 F.2d 518 (8th Cir. 1977).

[155] 552 F.2d 788 (8th Cir. 1977). In *Robbins*, the court acknowledged its reliance on *Ault* in arriving at its decision: "We have applied the *Ault* rationale in allowing proof of post-occurrence design modification and a subsequent remedial instruction. . . ."*Id.* at 793.

[156] *See supra* notes 13-19 and accompanying text.

[157] 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

[158] *See supra* notes 13-19 and accompanying text.

[159] *Werner*, 628 F.2d at 851.

[160] *Id.* Cleocin was used almost exclusively as an alternative for people allergic to

came more widespread, Upjohn, the manufacturer of Cleocin, received reports of side effects from the use of the drug, the most dangerous of which was a form of colitis.[161] A number of studies on the effects of Cleocin were made, the findings of which were published by Upjohn in warnings which the company sent to physicians, informing them of the drug's possible side effects.[162] Revised warnings were sent out by Upjohn in both 1974 and 1975.[163]

In December 1974 the plaintiff visited a doctor complaining of an inflamed cyst on his eyelid.[164] The doctor prescribed Cleocin, warning the plaintiff that he might experience certain side effects.[165] The plaintiff denied receiving this warning.[166] Approximately five days after he started taking Cleocin, the plaintiff began to feel nauseous and discontinued use of the drug.[167] Shortly thereafter, he developed severe diarrhea and dehydration, probably due to the fact that during this period, he was also taking an antiperistaltic agent.[168] In January 1975 the plaintiff visited another doctor who diagnosed the plaintiff as having pseudomembranous colitis (PMC), the condition mentioned in Upjohn's 1974 warning.[169] In addition to having other operations, part of the plaintiff's colon had to be removed. Even after surgery, the plaintiff still suffered from the side effects of PMC.[170]

---

penicillin.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 851-53.

[164] *Id.* at 852.

[165] *Id.* Among the side effects warned of in the 1974 warning were vomiting, nausea, and diarrhea. The warning also recommended methods of relief. Furthermore, the 1974 warning cautioned that the use of Cleocin in conjunction with antiperistaltic agents (chemicals that induce intestinal contractions forcing the contents upward) might prolong and/or worsen the condition. *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.* The plaintiff was taking Lomotil, an antiperistaltic agent effective in relieving diarrhea, which in plaintiff's case was caused by the use of Cleocin. The Lomotil, however, merely worsened the plaintiff's condition, as was cautioned in the Upjohn warning. *Id.*

[169] *Id.*

[170] *Id.* At the time this action was brought in 1980, the plaintiff was under dietary restrictions, had diarrhea, could not engage in strenuous athletic activity, and tired

The central issue at trial was the adequacy of the 1974 warning, and both sides presented a great deal of evidence concerning the warning.[171] As a part of his case, the plaintiff, over Upjohn's objection, introduced evidence of a warning published in March 1975 which significantly expanded upon the 1974 warning.[172] The court denied Upjohn's motion to exclude all reference to the 1975 warning,[173] and the jury found in favor of the plaintiff.[174]

On appeal, the Fourth Circuit reversed the district court, holding that the rule against subsequent repairs is applicable to strict liability actions.[175] The court reasoned that because Rule 407 does not mention strict liability, the court should examine the common law of the rule against admission of subsequent repairs in negligence actions and determine if the policy reasons which caused the enactment of Rule 407 would be subverted if such evidence were admitted to prove strict liability.[176] The Fourth Circuit found that in passing the federal rule Congress intended the common law to fill the gaps and omissions in the new rule.[177] In examining the development of Rule 407, the court was convinced that Congress intended that evidence of subsequent repairs be excluded in cases involving not only negligence, but also in cases where the defendant is charged with culpable conduct.[178] Strict liability, however, involves conduct which is less blameworthy than simple negligence, because no breach of duty must be proven in a strict liability case.[179] From a policy standpoint, the court opined, it follows that if the rule expressly excludes evidence

---

easily. *Id.*

[171] *Id.*

[172] *Id.* at 853.

[173] *Id.*

[174] *Id.* at 851.

[175] *Id.* at 857.

[176] *Id.*

[177] *Id. at 856.*

[178] *Id.* at 857. According to BLACK'S LAW DICTIONARY 341 (rev. 5th ed. 1979), "culpable" means that an act is wrong, but not necessarily malicious.

[179] All plaintiff need prove to make out a case in strict liability is a defective product, control of the product by the defendant, and a link between the plaintiff's injuries and the defect. *See supra* note 8.

of subsequent repairs to prove culpable conduct, the same should be true for strict liability.[180]

The court's second reason specifically addressed one of the crucial issues in the *Ault* decision - the fundamental difference between negligence and strict liability.[181] The *Werner* court, however, disagreed with the *Ault* court. In *Werner*, the court conceded the obvious difference between the two types of actions,[182] but determined that the difference should not produce a different result.[183] The policy behind Rule 407 is to encourage manufacturers to repair and upgrade products, a policy which would be circumvented if evidence of such repairs was admissible.[184] It is difficult to understand, the court held, why this policy should apply differently to negligence and strict liability actions.[185] To a defendant facing liability for an alleged defect in a product, it makes no difference under which theory the action is brought, for if the evidence is admitted under either theory, the manufacturer will be deterred from making subsequent repairs.[186] In reaching this conclusion, the *Werner* court specifically rejected the rationale of *Ault*, holding, as the majority of courts do, that evidence of subsequent repairs is inadmissible in a strict liability action.[187]

---

[180] *Werner*, 628 F.2d at 857. The court stated, however, that this is true only if negligence and strict liability are not distinguishable on some other ground. The court could find no such distinguishing factor. *Id.*

[181] *Id.*

[182] Note, *Subsequently Remedying*, *supra* note 121, at 769. The advocates of admitting evidence of subsequent repairs argue that in negligence actions, the defendant is on trial, while in strict liability, the focus is on the product. *See supra* note 121 and accompanying text.

[183] *Werner*, 628 F.2d at 857.

[184] *Id.*

[185] *Id.*

[186] *Id.* The Second Circuit in Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 2036 (1982), pointed out that, regardless of whether the action is brought in negligence or strict liability, the defendant must pay the judgment in both situations.

[187] *Werner*, 628 F.2d at 857 (4th Cir. 1980). The court gave two additional reasons why the *Ault* rationale should be rejected. First, it does not embrace a situation where a manufacturer alters a product not because it is defective, but because it could be made better or less expensively. By improving a nondefective product a manufacturer could be opening himself up to unjustified liability. Second, if *Ault* were to be followed in the federal courts, it might override Rule 407 since its reason-

C. *Analysis of the Arguments*

1. *The Ault Rationale*

The California Supreme Court in *Ault v. International Harvester Co.*[188] held that evidence of subsequent repairs should be admissible in products liability actions and based its holding on two premises.[189] The first premise was that the language of the statute spoke solely to negligence, not to strict liability, because "culpable conduct" refers only to negligence, not strict liability.[190] As one commentator points out, however, this distinction is not as clear cut as the *Ault* court would have one believe; a manufacturer can be seen as being guilty of culpable conduct by merely placing a defective product on the market.[191] Under this line of reasoning, the attenuated distinction between negligence and strict liability breaks down further, especially when one considers that most plaintiffs who bring an action against a manufacturer do so on the combined theories of negligence, breach of warranty, and strict liability.[192]To admit evidence under one theory would require the evidence to be before the jury. Because the three theories have similar elements, it is inevitable that the jury will confuse the theories and the evidence, and thus the overall purpose of the rule against subsequent repairs would be circumvented.[193]

The second premise relied upon by the *Ault* court was that repairs would be encouraged by admitting the evidence, not excluding it.[194] The court reasoned that a manufacturer would repair a product if faced with liability under a products liabil-

---

ing that subsequent repair evidence is admissible in strict liability might apply with equal force in negligence actions. *Id.* at 857-58. See *supra* notes 13-19 for a discussion of the cases holding as *Werner* does.

[188] 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975).

[189] *Id.* at 117-20, 528 P.2d at 1150-52, 117 Cal. Rptr. at 814-16 (1975).

[190] *Id.* at 117-18, 528 P.2d at 1150, 117 Cal. Rptr. at 814.

[191] Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L. J. 5, 15 (1965), *cited in* Comment, *supra* note 24, at 214-15.

[192] Comment, *supra* note 24, at 225.

[193] *Id.* at 226. See Eshbach v. W. T. Grant's & Co., 481 F.2d 940 (3d Cir. 1973) for an example of the confusion presented when the two theories are pleaded together.

[194] *Ault*, 13 Cal. 3d at 120-21, 528 P.2d at 1152, 117 Cal. Rptr. at 816.

ity theory where the plaintiff has a lighter burden of proof.[195] The court offers no proof, however, as to why the manufacturer would be more compelled to repair if faced with a products liability suit than if faced with a negligence suit, for liability under either action is enough to deter a manufacturer from subsequently altering his product.[196] Furthermore, the *Ault* court would admit evidence of subsequent change for any reason, regardless of why a manufacturer changes his product.[197] As Justice Clark pointed out in his dissent in *Ault*, to impose liability on this basis would often penalize a manufacturer for making his product safer or more cost-efficient.[198] In the dissenter's view, evidence of subsequent repair should be admitted only when the plaintiff can satisfy the balancing test advocated by Professor McCormick.[199]

Finally, the possibility of juror misuse of evidence of subsequent repairs is such a real threat as to make admission of such evidence even under the recognized exceptions potentially explosive.[200] The similarities between certain elements of a negligence action and a strict liability action are such that the difference in the two theories is virtually indistinguishable to a jury.[201] To admit evidence of subsequent repairs in order to prove a strict liability action, while warning the jury that such evidence is not an admission of negligence, and to expect the jury not to confuse the issue is to expect the impossible.[202] Even with a proper limiting instruction, the chances that the

---

[195] *Id.*

[196] Comment, *supra* note 24, at 223. *See also* Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (court determined that a defendant will be deterred from repairing regardless of the theory under which relief is sought).

[197] *Ault*, 13 Cal. 3d at 117, 528 P.2d at 1152, 117 Cal. Rptr. at 816.

[198] *Id.* at 126, 528 P.2d at 1156, 117 Cal. Rptr. at 820. Justice Clark points out the absurdity of this proposition by pointing to the hundreds of changes made to new models of automobiles every year. He queries as to whether the *Ault* majority would interpret each of these modifications as an admission that the car was defective. *Id.*

[199] *Id. See infra* note 222 and accompanying text for McCormick's test.

[200] Note, *Products Liability*, *supra* note 11, at 850; V. WALKOWIAK, *supra* note 32, at 2-8.

[201] Note, *Products Liability*, *supra* note 11, at 850. In both theories, for example, plaintiff must show causation between his injury and the defendant's product or instrumentality.

[202] *Id.* at 850-51; *see also* Comment, *supra* note 24, at 215-16.

jury will construe evidence of subsequent repairs as an admission of guilt are too great to justify the admission of the evidence.[203]

2. *The Werner Rationale*

The majority position, that evidence of subsequent repairs is inadmissible, is not without its shortcomings. First, the rule against admissibility deprives the trier of fact of evidence which usually will affect the ultimate outcome of a case.[204] While such evidence has no bearing on antecedent negligence, it is relevant in proving a defect in a product and that the defendant had control of the defect.[205] Furthermore, admitting evidence of subsequent repairs may be the only way a plaintiff can survive a motion for directed verdict, and according to Professor McCormick, in that instance such evidence should be admitted.[206]

Another reason why the *Werner* rationale should not be followed is because to adhere strictly to Rule 407 in strict liability actions would limit to a great extent the usefulness of the theory of strict liability. The policy reason behind strict liability is to encourage safer products by allocating loss to the defendant manufacturer by easing the plaintiff's burden of proof. To rigidly exclude all evidence of subsequent repairs in strict liability actions would be to substantially repudiate that policy, for without that evidence a plaintiff would have a much more difficult time making out his cause of action, and the purpose of strict liability would be defeated.[207]

---

[203] Note, *Products Liability*, *supra* note 11, at 851. *See also* Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 233 (6th Cir. 1980) (failure of trial court to give proper limiting instruction after admitting subsequent repair evidence is reversible error).

[204] Note, *Post-Accident Repairs and Offers of Compromise-Shaping Exclusionary Rules to Public Policy*, 10 LOY. U. CHI. L.J. 487 (1979).

[205] *See supra* note 8.

[206] MCCORMICK, *supra* note 5.

[207] *See, e.g.*, Barry v. Manglass, 55 A.D.2d 1, 389 N.Y.S.2d 879, 885 (1976), *cited in* Note, *Subsequently Remedying*, *supra* note 121, at 787. ("[W]hile it may be sound to exclude evidence of post injury remedial safety measures in negligence cases because the repairs reflect hindsight rather than foresight and might militate against the making of such repairs, to extend the rule to cases of strict products liability would, without basis in reason, permit an arbitrary exclusionary rule to operate in the field of consumer protection.").

Finally, the policy behind the rule against subsequent repairs, that of encouraging repairs, may no longer be material. There may be more persuasive incentives to encourage repairs, such as cost-efficiency, fear of adverse publicity, fear of additional lawsuits, and political pressures from governmental agencies.[208] While the policy behind Rule 407 was laudable at one point, today it may no longer be viable when applied to strict products liability. Furthermore, it is unclear whether the policy of encouraging repairs was ever a valid one, for nowhere has there been cited any empirical data that a single repair was made because evidence of subsequent repairs was excluded from a particular case.[209]

IV. CONCLUSION

Federal Rule of Evidence 407, the rule against subsequent repairs, is a rule riddled with exceptions.[210] It is a rule whose supportive policy may or may not be valid. The once absolute rule against admission of evidence of post-accident repairs is now viewed by many as a rule of inclusion, rather than one of exclusion.[211]

Should the rule be discarded in strict products liability actions, as many suggest? It is submitted that the rule should be maintained for two reasons. First, the courts now recognize a number of exceptions to the rule. The once absolute rule against the admission of evidence of subsequent repairs is now subject to the recognized exceptions concerning the defendant's control or ownership of the accident-causing instrumentality,[212] the feasibility of a safer design of the instrumentality,[213] and the impeachment of defendant's witnesses and testimony.[214] These exceptions are broad enough in scope to encompass much of what a plaintiff needs to prove to make out a cause of action. Most evidence that is excluded under

---

[208] *Ault*, 13 Cal. 3d 113, 120, 548 P.2d 1128, 1152, 117 Cal. Rptr. 812, 815-16 (1975).
[209] Schwartz, *supra* note 11, at 6.
[210] *See supra* notes 71-113 and accompanying text.
[211] *See supra* note 66 and accompanying text.
[212] *See supra* notes 71-82 and accompanying text.
[213] *See supra* notes 83-97 and accompanying text.
[214] *See supra* notes 98-106 and accompanying text.

the general rule against subsequent repairs can be admitted under one of the exceptions. Furthermore, there is no reason to admit all evidence of subsequent repairs, because in combined strict liability/negligence actions the possibility that the jury will misconstrue the evidence is all too apparent.[215] Only that evidence which gives defendant an unfair advantage by giving him a direct benefit over and above the fact of exclusion should be admitted, and in these situations the exceptions to Rule 407 override the general rule.[216] If evidence of subsequent repairs is admitted under this procedure, the chances of juror misuse greatly diminish, and both plaintiff and defendant are protected.[217] Additionally, with the advent of alternative pleading,[218] a plaintiff is presented with a variety of ways of admitting his evidence.[219] If, as the *Ault* court held, the premise of strict liability is to enable the plaintiff to more easily make out a cause of action by easing his burden of proof,[220] abolishing the rule against subsequent repairs is not the only way to accomplish this end. Indeed, alternative pleading and admission under the exceptions to Rule 407, while maintaining the general rule, is a better answer, for it prevents juror misuse of sometimes complex evidence. In light of the foregoing discussion, there is simply no reason to abol-

---

[215] *See, e.g.*, Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 2036 (1982); Ault v. Int'l Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975) (Clark, J., dissenting).

[216] Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

[217] See Ault v. Int'l Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975) (Clark, J., dissenting) for a discussion of a balancing test which if adopted would achieve this goal.

[218] Alternative pleading is permitted under FED. R. CIV. P. 8(e) (2), which provides in relevant part: "A party may set forth two or more statements of a claim or defense alternatively or hypothetically. . . ."

[219] Comment, *supra* note 24, at 225. The author suggests six different ways a plaintiff can get evidence of defect and causation admitted in products liability actions without emasculating the rule. Those ways are: 1) introduce evidence of defect itself; 2) introduce evidence regarding events leading up to the accident; 3) introduce evidence of the history of the life of the product; 4) introduce evidence of similar products and uses; 5) eliminate alternative causes of accident; 6) use circumstantial evidence. *Id.* at 228.

[220] Ault v. Int'l Harvester Co., 13 Cal. 3d 113, 118, 528 P.2d 1148, 1150, 117 Cal. Rptr. 812, 814 (1975).

ish the rule on the ground that Rule 407 would exclude absolutely all evidence of subsequent repairs.

Secondly, a better alternative is available. Instead of excluding the evidence completely, or letting all evidence in, it is submitted that by employing a balancing test such as the one suggested by Professor McCormick,[221] the best of both views can be accommodated. Professor McCormick would admit evidence of subsequent repairs only if the following test were met: "1) the evidence must be of substantial importance and actually, not merely formally in dispute; 2) the plaintiff cannot establish the fact to be inferred conveniently by other proof; and 3) in the opinion of the court, the need for the evidence outweighs the danger of its misuse."[222] This is the balancing test, or "three part test" that Justice Clark advocated in his dissent in *Ault v. International Harvester Co.*[223] In Clark's opinion, this test must be used in both negligence and strict liability actions, for "the danger of misuse [is] not cured when the issue before the jury is defect rather than negligence. . . ."[224] By using this balancing test, defendants would still enjoy the protection of Rule 407, except in the extreme case where a plaintiff could satisfy all three elements of the McCormick test. Prejudicial evidence could be excluded by the trial judge if it were thought capable of confusing or inflaming the jury, while at the same time defendants would be free to later repair products, for whatever reason, knowing that the evidence will not be used as an admission of guilt. Thus the policy reasons behind Rule 407 would be preserved. On the other side, the plaintiff would still enjoy the use of subsequent repair evidence when the evidence was deemed by the trial court either to come within one of the exceptions, or to satisfy the balancing test. In this way the plaintiff has a better chance of admitting his evidence. Thus, it is submitted that both plaintiff and defendant would not only be in a posi-

---

[221] C. McCORMICK, *supra* note 5.

[222] *Id.*

[223] 13 Cal. 3d 113, 125-26, 528 P.2d 1148, 1156-57, 117 Cal. Rptr. 812, 820-21 (1975).

[224] *Id.*

tion where both interests are more favorably protected, but also where each can dependably rely on a consistent interpretation of Rule 407, the rule against subsequent repairs.